FOR ARGUMENT

No. 77-444

In the Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK and HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

On Appeal from the Court of Appeals of the State of New York

Brief of Amicus Curiae State of California

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

This Court noted probable jurisdiction on December 5, 1977. 28 U.S.C. section 1257(2). This amicus curiae brief is respectfully submitted by the State of California (pursuant to Rule 42(4) of this Court) acting by and through the Attorney General of the State of California on behalf of the California Coastal Commission and the San Francisco Bay Conservation & Development Commission.[1]

1. The California Coastal Commission is an agency of the State of California, charged with the duty of developing and enforcing plans for the permanent protection and restoration of the California coastline. Calif. Public Resources Code section 30000 et seq. The Commission and its functions are the outgrowth of an extensive planning and regulatory process mandated by the People of California in an initiative adopted in 1972. The constitutionality of that planning and regulatory process has been upheld against constitutional attack. *CEEED v. California Coastal Zone Conservation*

INTEREST OF THE STATE OF CALIFORNIA

The California Coastal Commission and the San Francisco Bay Conservation & Development Commission, the two agencies of the State of California at whose request this brief has been filed, have extensive regulatory authority over the proposed use and development of land and water areas within their respective jurisdictions. Protection of the natural resources and environment of the California coastline and of San Francisco Bay is a paramount objective for these agencies. See for example *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533. Actions taken by these agencies to promote the objective of protection of coastal natural resources has resulted in litigation where landowners have charged that the effect is to have inversely condemned their properties. See for example *State of California v. Superior Court* (1974) 12 Cal.3d 237; *Candlestick Properties, Inc., supra,* and *Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1. It has been the consistent position of these agencies that their regulatory actions, taken pursuant to their respective enabling laws, constitute exercises of the police power and not exercises of the power of eminent domain.[2]

Commission (1974) 43 Cal.App.3d 306. The San Francisco Bay Conservation & Development Commission is also a public agency of the State of California. Calif. Government Code section 66600 et seq. One of the Commission's main purposes is to provide permanent protection for the San Francisco Bay and its shoreline. The Commission's enabling legislation has likewise been upheld against constitutional attack. *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557.

2. The agencies, in addition, exercise trustees' powers over areas subject to the public trust for commerce, navigation and fisheries. *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 549; *Marks v. Whitney* (1971) 6 Cal.3d 251; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387.

While the instant case concerns the principles of law to be applied in landmark preservation efforts by public agencies, some of the principles involved are the same as those which govern the environmental protection efforts of these agencies. Therefore, the State of California respectfully requests that its contentions be considered in the instant matter.

SUMMARY OF ARGUMENT

It is the position of amicus curiae that the actions of New York City in prohibiting construction of a multi-story office tower above Grand Central Terminal constituted exercises of regulatory authority pursuant to the police power. There was no attempt by New York City to acquire the property and no inequitable pre-condemnation activity by the City. Therefore, as a matter of law, no taking occurred and Penn Central is not entitled to just compensation.

Exercises of the police power are valid without any requirement of compensation if they do not violate constitutional requirements. If regulatory actions would violate constitutional standards by constituting a taking, they are invalid and not enforceable. Even in this event, no compensation is required to be paid to affected landowners. *Fred F. French Investing Co., Inc. v. City of New York* (1976) 385 N.Y.S.2d 5, 8, appeal dism'd. 429 U.S. 990. In this regard, *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 did not hold that a taking had occurred requiring payment of just compensation.

Finally, amicus curiae suggests that the residual economic benefit left to the landowner following regulation, one of the criteria usually considered in determining the validity of police power exercises, is best determined by comparing

before and after market values. This familiar and objective test is shown to be superior to tests requiring determinations that a reasonable rate of return is possible or that a reasonably beneficial use exists.

I

PENN CENTRAL HAS ASSUMED THAT A "TAKING" OCCURRED BY VIRTUE OF NEW YORK CITY'S ACTIONS; THIS ASSUMPTION IS ERRONEOUS AND SERVES TO OBSCURE THE REAL ISSUE, WHICH IS WHETHER THE CITY'S ACTIONS CONSTITUTED A VALID EXERCISE OF THE POLICE POWER.

A. Penn Central's Formulation of the Issues.

In the first paragraph of its jurisdictional statement, Penn Central indicates that its appeal is from a lower court decision "which holds that Penn Central is not entitled to just compensation for the development rights to the Grand Central Terminal that have been taken from it by operation of the New York City Landmarks Preservation Law." Jurisdictional statement at p. 1. Under "Questions Presented" Penn Central has formulated two of the four issues in terms of whether it is entitled to just compensation for "private property taken for public use". Jurisdictional statement at p. 3. Thus, Penn Central's legal analysis flows from the premise that the actions of New York City in regard to the Grand Central Terminal constituted a taking of private property for public use. We shall demonstrate that this is an incorrect premise. Once the faulty nature of that premise is recognized, the irrelevance of much of Penn Central's argument becomes apparent.

B. The New York City Actions Pertaining to Grand Central Terminal Were Regulatory in Nature and Are Properly Judged by Whether They Constituted Valid Exercises of the Police Power.

This case arose as a result of decisions of an administrative body of New York City denying permission to Penn Central to build a multi-story office tower above Grand Central Terminal. The actions were taken pursuant to the express provisions of City legislative enactments authorizing the designation of landmarks and imposing a permit requirement for proposed alterations to landmarks. See generally, city's motion to dismiss at pp. 2-5. This legislation, with the implementing administrative mechanism, operates to control the conditions and circumstances under which use may be made of certain property. It is thus a classic example of a land use regulatory measure. See for example the zoning ordinance and implementing administrative mechanism sustained in *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365.

This does not ipso facto absolve them from any judicial review; as exercises of the police power they must be judged for their validity. However, absent any indication that the actions operated to create an actual public use or to unfairly utilize the power of government prior to acquisition, principles of eminent domain and just compensation are not applicable. *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, cert. den. 425 U.S. 904.

The first issue which generally presents itself in dealing with a police power measure is whether it is valid on its face. In this regard the elastic nature of the police power has been recognized by this court. *Euclid v. Ambler Realty Co., supra*, at p. 387; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 5-6. The presence of a reasonable basis and the legitimacy of the objective of preserving historic landmarks

would seem to be beyond doubt (*Maher v. City of New Orleans* (5th Cir. 1975) 516 F.2d 1051 (including the cases cited at pp. 1059-60, fn. 44), cert. den. 426 U.S. 905; *Bohannon v. City of San Diego* (1973) 30 Cal.App.3d 416), and is not challenged by Penn Central. Brief for appellants at p. 12. The reasonable basis need only be "fairly debatable". *Maher v. City of New Orleans, supra,* at p. 1061. Judged by that standard, New York City's landmark law is valid as enacted. Therefore, the New York landmark legislation and administrative decisions made pursuant thereto constituted exercises of the police power.

The second issue, perhaps one of the most important in this case, is whether the City's administrative decisions denying the office tower somehow constituted acts of eminent domain resulting in a taking of Penn Central's property, or whether they merely constituted regulatory determinations taken pursuant to the enabling legislation. This question must be determined by the form and substance of these decisions. In this regard, the similarity between the circumstances of the case at bar and those involved in *Maher v. City of New Orleans, supra,* bear close analysis. Here, as in *Maher,* permission was required from an administrative body prior to construction which would alter or destroy historically valuable buildings. The standards governing the decision in New Orleans or in New York involve assurance that such new construction operates to preserve the historical and cultural values present. In the case at bar the decision to deny the office tower was based on the prior designation of Grand Central Terminal as a landmark. In *Maher* the enactment authorized:

> "preservation of such buildings in the Vieux Carre section of the City of New Orleans as, in the opinion of said Commission, shall be deemed to have architectural and historical value, . . ." *Id.* pp. 1053-54.

The only difference between this case and *Maher* is that the landmark buildings in New Orleans designated for preservation are apparently located in one area, whereas in New York historical buildings are apparently spread throughout the city. This distinction is without a difference since in both instances significant buildings are regulated in a similar manner. In *Maher* the issue was resolved by analyzing whether or not the regulatory action denying construction was valid. This case should be judged in the same manner.

In an analogous situation, the California Supreme Court has ruled that inverse condemnation is not an appropriate remedy to challenge the validity of a land use regulatory action, but that judicial review to determine the validity of conditions attached to development approval is appropriate. *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110. Specifically on this point, the court held:

> "Nor is a cause of action in inverse condemnation stated for the denial of a building permit. The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." *Id.* p. 128.

Likewise, Penn Central desires to develop its property. Presumably the development process was not commenced with the idea of provoking a forced and unanticipated sale to New York City. As the California Supreme Court has recognized, the remedy should be one which is consistent with the landowner's objectives.

In sum, the New York City actions were regulatory in form. The substance and effect of the actions were also

regulatory since they operated as constraints on the use of the Grand Central Terminal site. Finally, judicial review for the validity of the actions taken serves Penn Central's objectives of determining whether or not and how it can make additional use of the property. For all of these reasons, the New York City actions should be considered as regulatory in nature and therefore the proper subject of judicial review for their validity. Principles of eminent domain and just compensation are not relevant.

C. "Taking" Cases Are Not Relevant.

In *Benenson v. United States* (U.S. Ct. of Claims 1977) 548 F.2d 939, the Court found that the sum total of governmental action aimed at preventing demolition of the Willard Hotel in Washington, D.C. so as to facilitate acquisition constituted a taking. Significantly, governmental involvement in the area of the hotel began as early as 1962. *Benenson, supra,* at p. 941. Many events occurred between 1962 and 1976. For example, there were numerous attempts to negotiate acquisition of the property. On two occasions legislation was enacted which affected the owner's use of the property. Also, during this time the government's purpose changed from demolishing the hotel to preserving it! Finally, attempts to seek approval for new uses were frustrated because of the government's desire to acquire the property. The court concluded from *all* these governmental acts that a taking had occurred. *Benenson, supra,* at p. 952.

Benenson, whether correctly decided or not, is completely distinguishable from the case at bar. In *Benenson* the government's intent almost from the beginning was to bring the hotel site into public ownership. Efforts by the owners to alter the building in any manner were prevented in order to preserve the government's options. The courts have

traditionally been wary of possible unfair dealings by governmental agencies in anticipation of public acquisition since the potential for abuse in affecting market value to the owner's detriment is present.[3] For example, in *Drake's Bay Land Company v. United States* (U.S. Ct. of claims 1970) 424 F.2d 574, the government undertook many acts to prevent development in anticipation of creation of the Point Reyes National Seashore (P.L. 87-657). The court held that the United States had acquired an inchoate interest in the property since Congress intended that the area be acquired.

This situation has arisen in the California courts as well. In *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, the County had refused to permit any development of the land in question (barring even the growth of most vegetation) while assuring the owner that the restrictions were of no consequence because the county intended to acquire the property for an airport. When, after denying the owner any use of his property for five years, the County renounced its intent to acquire the land, the appellate court concluded that due to the "exceptional and extraordinary circumstances" the property had been taken by inverse condemnation. *Peacock, supra,* at p. 854. See *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 517 at fn. 14.

Benenson is also distinguishable since the hotel involved there was forced to close, and the Court concluded that the owners could make no economic use of the property as a result of the governmental actions. In the instant case the Appellate Division of the New York Supreme Court made

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3. The other circumstance where a taking is found is where governmental action, purportedly only a regulation of use, results in physical use of private property. *United States v. Causby* (1946) 328 U.S. 256.

a finding of fact that Penn Central had failed to meet the burden of establishing that the terminal was incapable of earning a reasonable rate of return. City's motion to dismiss at p. 25. The New York Court of Appeals certainly did not reject this finding. It seems apparent that Penn Central simply failed to carry the burden of proof. *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594.[4]

Benenson, supra, at p. 947, relied on other cases which are not applicable here. In *United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155, the particular action was upheld without any requirement of just compensation; it is hardly a sound case upon which to base a taking conclusion. *Bydlon v. United States* (U.S. Ct. of Claims 1959) 175 F. Supp. 891, involved a total deprivation of all access to property, a classic taking case. In *Eyherabide v. United States* (U.S. Ct. of Claims 1965) 345 F.2d 565, the owner sought compensation for a taking of a tract of land surrounded on three sides by a Navy gunnery range. The facts recite a history of the property being shelled by military projectiles, etc. *Id.* pp. 568-569. It is more than apparent that the case is a classic example of appropriation of property by the government, an act which requires compensation under the Fifth Amendment. *Id.* p. 567. The precedential value of *Brown v. Tahoe Reg. Plan. Agcy.* (1973) 385 F.Supp. 1128, has been eliminated since the same judge subsequently held that no cause of action in inverse condemnation could be stated against the Tahoe Regional Planning Agency. *Western Internat'l Hotels v. Tahoe Reg. Plan. Agcy.* (1975) 387 F.Supp. 429. Moreover, the Ninth Circuit, on December 21, 1977, agreed that no inverse condemnation claim could be stated against the Tahoe Regional Planning

4. We shall suggest in III, *infra*, that remaining economic viability following regulatory action is best determined by comparing before and after market values. See generally *HFH Ltd. v. Superior Court, supra.*

Agency. *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1977) ..... F.2d ..... Regarding *Keystone Associates v. State of New York* (1975) 371 N.Y.S.2d 814, the basic decision on the underlying statute was rendered in an earlier New York Court of Appeals opinion. *Keystone Associates v. Moerdler* (1966) 278 N.Y.S.2d 185. Involved was a building occupied by the Metropolitan Opera Association for some 83 years. The new owner, Keystone, intended to demolish the building and erect a 40 story office building on the site. Legislation enacted by New York created a private corporation and vested it with the power to condemn the particular property and appropriate it for use as an auditorium. Of great significance, the court viewed the statute as an exercise of the power of eminent domain:

> "Since this is clearly and explicitly a condemnation statute, the question is to what extent, pending exercise of the power of condemnation, the Legislature may interfere with the rights of property owners to build upon or improve their property." *Id.* p. 188.

The statute was aimed at a particular piece of property for the sole purpose of acquisition. The court even concluded that the statute was not intended to protect public health, safety, and welfare as those terms are commonly understood. *Id.* p. 188. Thus, as with *Benenson,* the *Keystone* line of cases have no applicability to the present situation.

Penn Central has cited *United States v. General Motors Corporation* (1945) 323 U.S. 373, in support of the argument that just compensation is required for the taking of private property. Jurisdictional statement at pp. 14 & 18. A mere statement of the issues serves to demonstrate the inapplicability of *General Motors:*

> "This case is one of first impression in this court. It presents a question on which the decisions of federal courts are in conflict. [footnote omitted] *The problem*

> *involved is the ascertainment of the just compensation required by the Fifth Amendment of the Constitution, where, in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease.*" *Id.* pp. 374-75 (emphasis added).

General Motors plainly involved the amount of required compensation where a taking had already occurred. The issue in the present case is whether there has been a valid exercise of the police power.

Finally, *Texas Antiquities Committee v. Dallas County Community College District* (1977) 554 S.W.2d 924 is not relevant since the opinion dealt only with historical buildings controlled by public agencies and, in any event, the court struck down the statute since it lacked reasonable standards. *Id.* pp. 926-27.

In sum, New York City has not evidenced any desire to acquire Grand Central Terminal. Rather, the City has sought to regulate alterations to the site under prescribed standards. This combined with the absence of any pre-condemnation activity or actual public use eliminates the possibility that the regulatory actions of the City should be treated as exercises of the power of eminent domain.

II

JUDICIAL REVIEW IN THIS CASE SHOULD BE FOR THE PURPOSE OF DETERMINING WHETHER THE ACTIONS OF NEW YORK CITY ARE VALID OR WHETHER THEY CONSTITUTE A VIOLATION OF DUE PROCESS AND ARE THEREFORE INVALID.

A. Established Law Holds That Improper Exercises of the Police Power Will Be Voided by the Courts Without the Additional Requirement That Affected Property Owners Be Given Just Compensation.

The New York Court of Appeals has aptly phrased the principle to be discussed in this section. In *Fred F. French*

Investing Co., Inc. v. City of New York, supra, 385 N.Y.S.2d 5, the Court stated:

> "As noted above, when the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." *Id.* p. 8.

In elaborating upon the point, the *French* court quoted from Professor Costonis:

> "'[T]he goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.'" *Id.* p. 9.

In *French*, a property owner sought a declaration of unconstitutionality and damages in inverse condemnation allegedly arising from the rezoning of two private parks. Under the rezoning, the parks were to be made available to the public and the air space above (development rights) was to be usable elsewhere in the Manhattan area subject

to approval by regulatory authorities and acceptance of the development rights by a qualified owner. The court held the zoning ordinance to be invalid but also held, applying the above principles, that there had been no inverse condemnation and consequently no requirement that the City pay just compensation.

Summarily stated, an exercise of the police power which would constitute a taking if enforced is a violation of due process and therefore invalid. Payment of just compensation to the landowner is not an additional condition necessary to afford complete judicial relief.

The California Supreme Court has analyzed the situation in the same manner. *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110. The essential facts are concisely stated in the opinion:

> "Plaintiff is a California corporation which owns several parcels of land, some located within the County of Ventura (hereafter referred to as the county) and some within the City of San Buenaventura (hereafter the city). In 1968 the City and County adopted the Ventura Avenue Area General Plan pursuant to section 65300 et seq. of the Government Code. [footnote omitted] As required by section 65302, subdivision (b), the plan contained a circulation element indicating the general location of existing and proposed streets. It revealed a proposed extension of Cedar Street over the western boundary of one parcel of plaintiff's city property, and other proposed streets extending through plaintiff's county land.
>
> The property upon which the proposed extension of Cedar Street was shown had been zoned for multiple dwellings by the city, and in 1970 plaintiff applied to the city for a building permit to construct a 54-unit apartment complex on that parcel. The application indicated that plaintiff intended to construct the building

> upon a portion of its property which the plan outlined as the location for the proposed extension of Cedar Street. *The city denied the permit, assertedly because plaintiff refused to dedicate the extension of Cedar Street included in the plan." Id.* p. 115-116. (Emphasis added.)

The California high court held that no claim could be stated in inverse condemnation, and that the only remedy was invalidation of the administrative action. This holding was reaffirmed two years later in *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508. Referring to *Selby,* the Court stated:

> ". . . we held in that case that a landowner could not employ inverse condemnation to challenge a zoning ordinance which required him to dedicate part of his land to the city as a condition of receiving a building permit. . . ." *Id.* p. 516.

In the case at bar, Penn Central complains of its inability to build an office tower. Even assuming (an assumption which seems unwarranted on the record) that the New York City actions constitute a frustration of Penn Central's property rights, the correct judicial result would be invalidation of the illegal action, not an award of just compensation.

In this regard, *Southpark Square Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, is instructive. There, the plaintiff brought an action in inverse condemnation complaining that as a result of the City's denial of a building permit, the affected property was lost in foreclosure proceedings. The permit denial was based on concern over the location of a future interchange in relation to the property and also concern that an award of compensation for the interchange would be substantially higher if the hotel plaintiff desired to build was in being when condemnation occurred. The Court held that the District Court was with-

out jurisdiction because the "claim asserted is 'so attenuated and unsubstantial as to be absolutely devoid of merit.' " *Id.* p. 344. Supporting this result was the recognition that under State law, mandamus was available to compel issuance of an improperly denied building permit. *Id.* p. 344.[5]

This issue has been considered and resolved in the same manner by the Ninth Circuit. *Union Oil Company of California v. Morton* (9th Cir. 1975) 512 F.2d 743. In *Union Oil,* four oil companies challenged the Secretary of the Interior's suspension of certain leases in the Santa Barbara Channel. While the relief sought was to set aside the suspension, it is apparent that the court analyzed the issues raised in terms of all possible legal remedies including compensation for a taking.[6] The relevant discussion is found in that portion of the opinion entitled "Suspension: Regulation or Taking?". The principles there stated are equally valid here. The court concluded that the Secretary had not been granted the power of condemnation with respect to the oil leases and that without statutory authorization the Executive Branch generally has no power of condemnation. *Id.* p. 750. The current case is analogous in that New York City made no effort whatsoever to exercise whatever eminent domain power it might have. Consequently, the following direction to the trial court states the principle which should also apply here:

> "If the trial court finds that the suspension, as limited by the Secretary's amended statement, complies

5. During the course of this discussion, the court observed that "other states have considered the availability of mandamus as a bar to an inverse condemnation action", citing, *inter alia, Selby Realty Co., supra. Id.* p. 344 at fn. 11.

6. Under federal practice the prayer for relief is not part of the claimant's cause of action and final judgment must grant appropriate relief even though not demanded. Rule 54(c) of the F.R.C.P.; 8 Moore's F.P. para. 54.60.

> with these requirements, Union's complaint should be dismissed. Otherwise, the order of suspension should be set aside as beyond the Secretary's statutory powers." *Id.* p. 752.

Again, it is seen that if a regulation affecting property is valid, compensation is not required. If such a regulation is invalid, it has no legal force. This basic principle should govern in the instant case to reject compensation claims flowing from the regulatory actions taken by New York City.

Sound reasons of public policy support this principle. In *Selby Realty Co., supra,* the court observed:

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Id.* p. 120.

In *HFH Ltd., supra,* the court, in the context of rejecting damages for losses occasioned during the judicial review process, stated:

> "Courts have thus recognized that '[o]f course, it is not a tort for Government to govern . . . .' (*Dalehite v. United States* (1952)) 346 U.S. 15, 57 (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 C.2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." *Id.* at p. 519.

In *Southpark Square Ltd.* the court noted:

> "A city would be unduly hamstrung if its permit decisions subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions." *Id.* p. 343.

The just cited language is particularly applicable in the present case, where the property interest in Grand Central Terminal and the development rights above the terminal have been separated for the convenience of appellants.

An additional sound reason of public policy supports the principle. Judicial recognition of inverse condemnation in a regulatory context would significantly reduce legislative control over the proper allocation of governmental financial resources. On the other hand, under the traditional judicial approach, voiding of an invalid regulation leaves the legislative body, rather than the courts, with the decision as to whether the circumstances warrant the exercise of the condemnation power and the expenditure of fiscal resources for acquisition of the property. This approach respects the proper roles of the courts and legislative bodies in determining the proper social allocation of financial resources. In *Kasser v. Dade County* (Florida 1977) 344 So.2d 928, the property owner sought rezoning of his property for a higher use. The request was denied. The owner brought an action claiming that the county had effectively taken the property without compensation. The court upheld the dismissal of the complaint on the basis that the owner had a sufficient remedy under local procedures to challenge the validity of the underlying zoning ordinance. The court stated:

> "Had review been sought in the stipulated fashion and the action by the Board found to be unreasonable and confiscatory, the County would then have had the

> option of rezoning the property or condemning it via its eminent domain authority. This result would have been more appropriate than that sought by the appellant herein, for the latter approach would put the County in the position of compensating a landowner who is in actuality dissatisfied with the zoning designation on his property—a designation which the appellant initially sought to change. It was the denial of that change which precipitated the instant controversy." *Id.* p. 929.

Thus the court recognized that invalidation of the zoning ordinance would give due process to the property owner and leave the County, the legislative body, with the option of whether to acquire the property by exercising its power of eminent domain.

The likely result of holding inverse condemnation to be available under the circumstances of the case at bar have been recognized:

> "Clearly the threat to the governmental pocket book will intimidate legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest. Yet the threat of contingent and unplanned for, liability through inverse condemnation would, especially in these places, deter legislators from enacting the kinds of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge." Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent*

Domain by the Courts: So-Called Inverse or Reverse Condemnation" Urban Law Annual 1-2 (1968).

Finally, in 1973, at the request of the Council on Environmental Quality, (42 U.S.C. 4342) Bossleman, Callies and Banta produced *The Taking Issue* (Council on Environmental Quality, 1973) as a study on the constitutional limits of governmental authority to regulate privately held land without payment of compensation. Some of the conclusions are worth noting:

> "The ratification of the Fifth Amendment closes one chapter of history and begins another. The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." *Id.* p. 104.
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> "The 'myth' of the taking clause has always lured landowners to expect more from it than prior precedents really justify." *Id.* p. 232.
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> "The myth of the taking clause is inhibiting the sort of reasonable regulatory action that is needed to protect the environment while respecting the position of individual landowners." *Id.* p. 324.

B. Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393 and Similar Cases Do Not Support Penn Central.

Penn Central has relied on *Pennsylvania Coal* for the proposition that just compensation is required in the present

case. See jurisdictional statement at p. 20. Various quotes from Justice Holmes' opinion in that case are cited by appellants.

Pennsylvania Coal, however, does not hold that regulation can require payment of compensation. That case involved an action for injunction to prevent the coal company from causing subsidence on the property of an individual property owner due to the company's underground mining activities. This Court set aside the injunctive relief which had been granted by the Pennsylvania courts. No question of compensation was even considered by this Court. The correct interpretation of *Pennsylvania Coal* has been stated by the California Supreme Court in *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879:

> "That was an action between two private parties, the statute involved admittedly destroyed previously existing rights of property and contract as reserved between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community. In those circumstances application of the statute to the property was held to effect such diminution in its value as to be unconstitutional and beyond the legitimate scope of the police power." *Id.* p. 891. (Emphasis added).[7]

Other cases from several states are often cited by property owners and developers for the proposition that regulation which allegedly leaves the property owner with little economic use constitutes inverse condemnation requiring

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7. The California court has also distinguished *Pennsylvania Coal* on the ground that it was decided before the principles of comprehensive zoning were established. *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 528, appeal dism'd. 371 U.S. 36.

just compensation. See for example *Arverne Bay Const. Co. v. Thatcher* (1938) 15 N.E.2d 587; *Dooley v. Town Plan. & Zon. Com'n of Town of Fairfield* (1964) 197 A.2d 770; *State v. Johnson* (1970) 265 A.2d 711; *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.* (1963) 193 A.2d 232; *Commissioner of Natural Resources v. S. Volpe & Co.* (1965) 206 N.E.2d 666; *Aronson v. Town of Sharon* (1964) 195 N.E.2d 341; *Town of Hempstead v. Lynne* (1961) 222 N.Y.S. 2d 526; and *Vernon Park Realty v. City of Mount Vernon* (1954) 121 N.E.2d 517. A close examination of these cases reveals that in each instance where the purported exercise of the police power was found to be invalid as applied, the action taken was invalidated.[8] In none of these cases was just compensation granted to affected landowners. Typical is the following statement in *Dooley, supra*:

> "In consequence, the regulations pertaining to the flood plain district can have no application to the plaintiffs' properties." *Id.* p. 775.

In conclusion, regulatory actions cannot lead to public agency liability for just compensation unless the actions were a guise for actual public use of private property or were part of a pattern of pre-condemnation activity. Since neither of these factors is present in the instant case, the regulatory actions of New York must be judged for their

8. In *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, the Court overruled a demurrer (the California equivalent of a motion to dismiss) and allowed an action brought in inverse condemnation to proceed. While the case dealt with ten acre zoning, it is apparent the Court was concerned with the possibility of actual public use of the affected property or inequitable pre-condemnation activites and thus refused to allow the case to be decided on the complaint alone. See *Eldridge, supra,* at pp. 628-29. Later cases decided by the same Court make this point clear. See *Leadership Housing v. City of Walnut Creek* (1977) 73 Cal.App.3d 611, 619-20; *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, 759.

validity. Principles of just compensation are not relevant as Penn Central can be afforded complete judicial relief via a due process determination as discussed in this brief.

III

REMAINING ECONOMIC BENEFIT TO THE OWNER, ONE OF THE FACTORS USUALLY CONSIDERED IN DETERMINING THE VALIDITY OF POLICE POWER EXERCISES, IS BEST DETERMINED BY COMPARING MARKET VALUES OF THE AFFECTED PROPERTY BEFORE AND AFTER REGULATORY ACTION.

A. The Impact of Regulatory Action on the Value of Affected Property Is But One of the Factors Which Determine the Validity of an Exercise of the Police Power.

In *Goldblatt v. Hempstead, supra,* this Court stated:

> "There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon, supra,* it is by no means conclusive, . . ." *Id.* p. 594.

This observation is borne out in cases where effect on value has not been the determining factor.

In *Sibson v. State* (N.H. 1975) 336 A.2d 239, the Court upheld the denial of a permit to fill wetlands as a valid exercise of the police power not requiring the payment of just compensation. In that case the property owners, having previously legally filled a two acre portion of a six acre tract of salt marsh, were denied permission to fill the balance of four acres. *Id.* p. 240. A judicial referee made extensive findings of fact in connection with the property, concluding that the four acres were part of a valuable ecological asset and that the proposed fill would do irreparable damage to an already diminished and irreplaceable natural asset. *Id.* p. 240. In reaching its holding, the Court specifi-

cally refused to decide the case on the basis that the plaintiffs had already received more than their purchase price from the fill and sale of the two acre portion. Rather, the Court decided the case with respect to the remaining four acres. *Id.* p. 241. The specific rule announced by the Court is as follows:

> ". . . the State action is sustained in these cases unless the public interest is so clearly of minor importance as to make the restriction of individual rights unreasonable." *Id.* p. 242.

In rejecting concern over the effect on value, the Court observed as follows:

> "The denial of the permit by the board did not depreciate the value of the marshland or cause it to become 'of practically no pecuniary value.' Its value was the same after the denial of the permit as before and it remained as it had been for milleniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit." *Id.* p. 243.

Sibson followed the decision of the Wisconsin court in *Just v. Marinette County* (Wisc. 1972) 201 N.W.2d 761, where it was held that prevention of the public harm which would occur from destruction of near shore areas was within the police power and that this regulatory objective could be accomplished without payment of compensation. Regarding the effect on property value, the Court stated:

> "The Justs argue their property has been severely depreciated in value. But this depreciation of value is

> not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.
>
> "We are not unmindful of the warning in Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322:
>
> '. . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'
>
> This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. [footnote omitted] The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans." *Id.* p. 771.

In *Turner v. County of Del Norte* (1972) 24 Cal.App.3d 311, the Court upheld a flood plain zoning ordinance which prohibited permanent structures and allowed only seasonal uses. *Id.* p. 314. The Court was not particularly concerned about the impact on the value of affected owners. Instead it held:

> "The zoning ordinance in question imposes no restrictions more stringent than the existing danger demands. Respondents may use their lands in a number of ways which *may* be of economic benefit to them." *Id.* p. 315 (emphasis added.)

This holding reflects the eminently sensible principle that regulation in the public interest may be validly undertaken, without requirement of compensation, in order to protect life and property. Impact on the property owner in such instances cannot be the guiding criteria. See also *Turnpike Realty Company v. Town of Dedham* (Mass. 1972) 284 N.E.2d 891, 900.

In instances where regulation has been utilized to abate nuisances, impact on value has not been the determinative factor. *Willard v. City of Eugene* (Ore. 1976) 550 P.2d 457. On other occasions, the balance between protection of the public interest and impact on private interests has favored the public notwithstanding the virtual elimination of private value. *Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515.

We have pointed out these various legal concepts because a narrow focus on the remaining economic benefit to the owner of property after regulatory action is not the exclusive criterion for determining the validity of regulatory action. It is not our contention that the impact on value is not relevant in the instant case. However, amicus firmly believes that such consideration cannot be the *only* relevant factor in determining the validity of regulatory action.

B. Analysis of the Tests Utilized by the Courts for Determining the Remaining Economic Viability of Property After Regulation.

1. THE TEST FOR DETERMINING WHETHER PROPERTY AFFECTED BY REGULATORY ACTION HAS REMAINING ECONOMIC VIABILITY HAS BEEN FORMULATED IN SEVERAL WAYS.

The New York Court of Appeals in the instant case utilized the test which requires that a landowner be capable of earning a reasonable rate of return under the landmark regulations. This concept has been formulated and applied

in other New York cases. See for example *Fred F. French Investing Co. v. City of New York, supra.* To apply this test in any given circumstance it would appear that inevitably a detailed factual inquiry must take place to identify and quantify the factors which would form the basis for a determination of whether it is possible for the property owner to realize a reasonable rate of return.

In *South Terminal Corp. v. Environmental Protection Agcy.* (1st Circuit, 1974) 504 F.2d 646, the Court rejected a claim that a taking had occurred by virtue of Environmental Protection Agency regulations which had the effect of eliminating some 1,000 planned upon parking spaces. These regulations further compelled a forty percent vacancy rate in the downtown core area. The Court stated:

> "However, the government has not taken title to the spaces and the decisions about alternative uses of the space has been left to the owner. The taking clause is ordinarily not offended by the regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner." *Id.* p. 678.

Here the Court required that reasonable uses be left to the owner. See also *Nectow v. Cambridge* (1928) 277 U.S. 183, 187. Again, application of this test requires complex factual inquiries involving the innumerable factors which could be utilized as a basis for determining whether particular uses would be profitable to the owner.

It will be shown below that market value comparisons are more objective and more easily ascertained.

2. COMPARISON OF BEFORE AND AFTER MARKET VALUES IS THE BETTER TEST.

A comparison of before and after market values is well known to the law. In *Euclid v. Ambler Realty Co., supra,* the affected parcels were allegedly worth $10,000 free of the challenged restrictions and only $2,500 if subject to those restrictions. *Id.* p. 384. Of course, this Court upheld the zoning ordinance there at issue without any requirement of compensation. The settled nature of this approach was acknowledged and followed by the California Supreme Court in *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508. In that case, the property owners alleged that a downzoning from shopping center commercial to residential use reduced the value of the property from $400,000 to $75,000. *Id.* p. 512.[9] In upholding the downzoning without compensation, the Court observed:

> "To demonstrate the settled nature of the issue before us we point out that the United States Supreme Court faced the same question in the first major constitutional challenge to modern zoning to come before it. (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016].) Tendering allegations almost identical to those urged here, the appellee in *Euclid* claimed that 'the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2,500 per acre. . . .' (*Id.* at p. 384 [71 L.Ed. at p. 309].) The court upheld the zoning against the claim that it constituted

9. It must be noted that this was not a mere paper loss for the owners. They had purchased the property for some $388,000. *Id.* p. 512.

> a taking of the property in question, settling some half century ago the question in the instant case." *Id.* pp. 514-515.

Precisely because of the significance of market value in determining just compensation in eminent domain proceedings, the courts in the United States are familiar with the legal principles and factual circumstances leading to determinations of market value. Therefore, comparison of the before and after market values is not only a more objective standard for determining the remaining economic viability of regulated property, but it is also very familiar to the judiciary.

Furthermore, this test, by its nature, reflects an economic value to the owner which other tests overlook. That is, an owner may sell the property and realize its economic value in that fashion. This is an option for "use" that rate of return or reasonable use approaches do not consider. The significance of this difference is illustrated by again referring to *HFH Ltd. v. Superior Court, supra.* In that case, the owners alleged that the zoning rendered their properties "useless" for single family residential purposes. The Court however recognized the economic significance of the substantial residual market value in upholding the zoning ordinance:

> "Plaintiffs also complain of the deprivation 'of any reasonably beneficial use of the said properties commensurate with its value.' In the same section of their complaint, however, they allege a remaining fair market value of $75,000. The substantial value of their land rebuts the allegation that they cannot enjoy any reasonably beneficial use of it. As to use 'commensurate with value,' we note the tautological quality of this statement. 'Value' is of course not an objective quality, but a social attribute of legal rights. Only if we con-

cluded that plaintiffs enjoyed a vested right in a previous zoning classification would the city's action have deprived them of a use commensurate with value; our courts have, however, clearly and frequently rejected the position that landowners enjoyed a vested right in a zoning classification." *Id.* pp. 512-513 (at fn. 2).

If the owners in *HFH* had been allowed to show that the property was useless to them in terms of their expectancy, the substantial residual value of the property if it were to be sold might have been ignored.

Comparison of market values has the added benefit of not necessitating close review of the current financial situation of the owner, whereas other tests could conceivably lead to the conclusion that if the current owner is unable to make a profitable use of the property, there is no remaining economic viability. Such tests could thus subject the validity of governmental power to the business acumen of the affected property owner, and, for that reason, are questionable. See, *Southpark Square Ltd. v. City of Jackson, supra,* 565 F.2d 338, 343-344. Such a result would also ignore the very valuable option of selling the property in order to realize its economic benefit.

CONCLUSION

For all of the foregoing reasons, amicus respectfully urges this Court to reject Penn Central's contention that a taking has occurred which entitles the owners to just compensation. Rather, this case should be resolved by determining whether New York City's actions are valid exercises of the police power. Even if the actions are beyond the City's powers, the remedy is invalidation—not judicially compelled purchase of the property.

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